APPEAL NO. 042405
FILED NOVEMBER 17, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 12, 2004, with the record closing on September 2, 2004. The hearing officer resolved the disputed issues by deciding that: (1) the respondent's (claimant) impairment rating (IR) is 20% as reported in an amended report by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission); and (2) the claimant is not entitled to reimbursement of travel expenses for medical treatment in (City 1) at the direction of the treating doctor. The appellant (self-insured) appeals, contending that the hearing officer erred in determining that the claimant has a 20% IR because that IR is based on a multilevel fusion that was performed after the date the claimant reached maximum medical improvement (MMI). The self-insured contends that the claimant's IR is 5% as originally reported by the designated doctor. No response was received from the claimant. There is no appeal of the hearing officer's determination against the claimant on the travel reimbursement issue and the hearing officer's determination on that issue has become final under Section 410.169.

DECISION

Reversed and remanded on the IR issue.

It is undisputed that the claimant sustained a compensable low back injury on _____, and that he reached MMI on the date of statutory MMI, April 5, 2002. In January 2001, the claimant underwent a surgical procedure consisting of the excision of a herniated nucleus pulposus at L4-5 and left hemilaminectomy. On April 15, 2002, a doctor selected by the treating doctor to act in the place of the treating doctor assigned the claimant a 14% IR under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides 4th edition).

The designated doctor examined the claimant on May 20, 2002, and using the AMA Guides 4th edition assigned the claimant a 5% IR under Diagnosis-Related Estimates (DRE) Lumbosacral Category II (minor impairment). In October 2003, the claimant underwent additional surgical procedures consisting of fusions at L3-4 and L4-5. In December 2003, the Commission advised the designated doctor that the claimant had undergone the two-level fusion and apparently sought clarification regarding the IR. In response to the Commission's inquiry, the designated doctor used the AMA Guides 4th edition to assign the claimant a 10% IR under DRE Lumbosacral Category III (Radiculopathy).

The hearing officer wrote to the designated doctor seeking clarification and advising the designated doctor about Commission Advisory 2003-10, signed July 22, 2003, and Commission Advisory 2003-10B, signed February 24, 2004. In response to

the hearing officer's letter, the designated doctor issued an amended report dated August 23, 2004, using the AMA Guides 4th edition to assign the claimant a 20% IR under DRE Lumbosacral Category IV (Loss of Motion Segment Integrity). It is clear from the designated doctor's amended report that he considered the claimant's multilevel fusion of October 2003 and utilized the aforementioned Commission Advisories in assessing the 20% IR. The self-insured filed a response to the designated doctor's amended report, noting that the undisputed date of MMI was April 5, 2002; that the multilevel fusion was done in October 2003, 18 months after the date of MMI; and that the Commission rules provide that the IR must be based on the claimant's condition at MMI.

For a claim for workers' compensation benefits based on a compensable injury that occurred before June 17, 2001, Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the designated doctor's opinion. The hearing officer found that the designated doctor's amended report assigning the claimant a 20% IR was not contrary to the great weight of the other medical evidence, and concluded that the claimant's IR is 20%.

In Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, the Appeals Panel cited Section 408.123(a), Rule 130.1(c)(3), and Texas Workers' Compensation Commission, *et al*. v. Garcia, 893 S.W.2d 504 (Tex. 1995) in determining that the designated doctor is to assess an IR for the compensable injury based on the injured employee's condition as of the date of MMI. The Appeals Panel noted that Rule 130.1(c)(3) "has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery." The Appeals Panel also wrote that the preamble to Rule 130.1(c)(3) noted that in the event that the MMI date is changed, the IR would have to be based on the injured employee's condition as of the changed MMI date.

In the instant case, it is clear that the 20% IR assigned by the designated doctor and adopted by the hearing officer was based on the multilevel fusion the claimant underwent in October 2003, which was subsequent to his MMI date of April 5, 2002. We agree with the self-insured that it was error for the hearing officer to adopt the 20% IR under these circumstances. Since there are several IRs in evidence, we do not consider it appropriate to simply render a decision that the claimant has a 5% IR as originally assigned by the designated doctor. Consequently, we must remand the IR issue to the hearing officer for the hearing officer to advise the designated doctor that the claimant's IR for the current compensable injury must be based on the claimant's condition as of the MMI date considering the medical record and the certifying

examination. *See* Rule 130.1(c)(3). The parties must be given an opportunity to respond to any amended report of the designated doctor.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the time in which a request for an appeal or a response must be filed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Robert W. Potts
Appeals Judge

CONCUR

_____
Daniel R. Barry
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge